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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3412 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes.

3. Whether Their Lordships wish to see the fair copy of the judgement? -

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? -

5. Whether it is to be circulated to the Civil Judge?

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DILIP G.PANCHAMIA

Versus

STATE OF GUJARAT

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Appearance:

MR DC RAWAL FOR MR MR ANAND for Petitioners

MR VB GHARANIYA, AGP for Respondent No. 1

MR MUKESH R SHAH for Respondent No. 2

MR BS PATEL for Respondent No. 4

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CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision:-17-2-1999.

ORAL JUDGEMENT

This petition has been filed for a direction to the respondents to fill up the four posts of Senior Inspector of Factories from persons in the waiting list of direct recruits prepared by Gujarat Public Service Commission (GPSC for short) and to appoint the petitioners to the post of Senior Inspector of Factories with immediate effect and to restrain from filling up the four posts of Senior Inspector of Factories by promotion of departmental candidates without appointing the persons in the waiting list and till the direct recruits acquire the number of posts available to them as per the statutory quota rule.

2. On 14th January, 1992 an advertisement was published by the GPSC in the local newspaper "Sandesh" inviting the applications for two posts of Sr. Inspector of Factories reserving one post from general category and other post for SC candidates. Elimination test was held 21-7-1990 and interview was held on 10th and 11th of June, 1991. Thereafter the result was declared and the list of 9 persons was prepared. Out of them first two persons were selected and seven persons were kept in waiting. The four petitioners are out of seven persons in waiting list. The names of two persons selected were sent to the Government and they were appointed and they are still working. The Recruitment Rules provide that the appointment to the post of Sr. Inspector of Factories can be made by direct recruitment as well as promotion in ratio of 1:1. It is asserted that the promotees have been appointed in excess their quota. The respondent is seeking to fill up the posts by promotion though the vacancies are required to be filled up by direct recruitment.

3. The petitioners have been selected by GPSC for the posts i.e. the petitioners are available and their select list/waiting list is operative. The petitioners are qualified engineers. The petitioners no. 1, 2 and 3 are degree holders having qualifications of B.E. (Mech.) and the petitioner no. 4 holds qualification of Diploma in Electrical Engineering. The petitioners have also put in service more than 10 years in the lower Class-II post

of either Inspector of Notified Factories or Jr. Inspector of Factories. The petitioners have filed the list to show that the promotees have been appointed in excess of their quota and the direct recruits have remained in deficit. From the communication of the GPSC it is made clear that the list is in force till 30th August, 1993 for a period of two years from the date of the notification of the selection. All the persons who were in the select list have already been appointed in the direct recruitment and the petitioners are waiting for their turn as they know that the direct recruits are very much in the deficit according to the Government circular as well. They come to know that the departmental promotion committee was convened on 8-5-1992 to select the departmental candidates for the post of Sr. Inspector of Factories and the Committee has already recommended the names to the Government. The appointment by promotion is in violation of the statutory Recruitment Rules for filling up the posts by direct recruitment and the promotion in the quota of 1:1. The petitioners made their representation dated 14-5-1992. But they have not received any reply and they apprehend that the promotion orders will be issued to the promotees.

4. In Special Civil Application No. 670 of 1990 the Department has filed an affidavit-in-reply taking a stand that the promotees cannot be appointed if direct recruits are in deficit of their number and the persons on waiting list are available.

5. The petitioners have also filed an affidavit to show that during the selection proceedings the advertisement was issued by the respondent - authority that there are vacant posts available in the department. Hence, the department sent requisition to fill up those vacant posts as per the Department Recruitment Rules. Request for direct recruitment was sent to GPSC. GPSC returned requisition to the department saying that the vacant post should be filled up from the waiting list or revised requisition be sent to it. As such, there is no question to fill up the post of Sr. Inspector of Factories from promotion quota. The vacant posts are available for direct recruit quota and the persons in the waiting list are also available. The respondent - State is required to fill up the posts in accordance with the statutory Recruitment Rules for Sr. Inspector of Factories and the department cannot deviate from its own policy in matter of the petitioners. When the turn of the petitioner came for promotion, the department has taken stand that the vacancies available were for direct recruits quota and if the petitioners happened to be

selected for direct recruits, then the department ignores the statutory rules. Thus, it is a clear instance of policy of pick and choose in direct violation of Article 14 and 16 of the Constitution of India and the action of the State is nothing but illegal, unconstitutional, perverse and discriminatory. The department has also adopted illegal mode in treating the the petitioners discriminatory and arbitrarily as the respondent has operated the waiting list in case of other employees in the same department and the appointments were made from the waiting list in operation. The vacancies are very much available. GPSC has sent the letter to the State Government to fill up the posts from the waiting list as the process is going on.

6. The main contentions of the learned counsel for the petitioners are that the statutory Rules provide the ratio of appointment of the Sr. Inspector of Factories by direct recruitment and by promotion is 1:1. The persons appointed by promotion are in excess than the persons appointed by direct recruitment even then the department is making appointment by promotion which is violative of the statutory rules of quota and arbitrary. Making appointment by pick and choose is also illegal and arbitrary. The vacancies occurred soon after preparation of the select list/wait list, the Government of Gujarat sent requisition of post to the GPSC to fill up those vacancies and the GPSC advised the Government to fill up those vacancies from the select list/wait list. Even then, the Government has not appointed the petitioners who are empaneled in the list, the inaction of the Government is illegal and against the statutory rules in respect thereof. Learned Counsel for the petitioner relied on the following decisions of the Supreme Court.

(i) The State of Maharashtra Vs. Sanjay Thakrey, reported in 1995 Suppl. (2) SCC 409. The Supreme Court held "Appointment of promotees in excess of quota was violative of rules and could not count for the purpose of seniority."

(ii) Madan Gopal Garg Vs. State of Punjab reported in JT 1995 (6) SC 188. The Supreme Court held " Once it is held that the appointment of the appellant was in excess of quota fixed for promotees and officers appointed by transfer, the said appointment has to be treated again an invalid appointment and it can be treated as a regular appointment only when a vacancy is available against the promotion quota against which the said appointment can be regularized. In other words, any such appointment in excess of the quota has to be pushed down to a later year

when it can be regularized as per quota and such an appointment prior to regularization can not confer any right as against who is directly appointed within the quota prescribed for direct recruits"

(iii) Keshav Chandra Joshi Vs. Union of India reported in AIR 1991 SC 284. The Supreme Court has held " When promotion is outside the quota, the seniority would be reckoned from the date of vacancy within the quota, rendering the previous service fortuitous, the previous promotion would be regular only from the date of vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would be proper to do just to the direct recruitees. The rule of quota being statutory one must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency."

(iv) State of Bihar Vs. Secretariat Asstt. Successfully Examinees Union reported in (1994) 1 SCC 126. It is has been held by the Supreme Court that the part of the High Court judgment dated 11-10-91 which directs the filling up of the vacancies of 1989, 1990 and 1991 from out of the list of the candidates who had appeared in the examination held in 1987 was set aside by the Supreme Court on the ground that the persons who became eligible to compete for appointments were denied the opportunity to take the examination and direction of the High Court would prejudicially affect them for no fault of theirs.

(v) State of Mysore Vs. S.R. Jayaram, reported in AIR 1968 SC 346 The Supreme Court held "Arbitrariness of the Government under Rule 9 (2) in sorting out the respondent and debarring from the post of Assistant Commissioner though he was ranked in 4th in the order of merit.

(vi) Kum. Neelima Misra Vs. Harindra Kaur Paintal reported in AIR 1990 SC 1402. The Supreme Court has held "Eligible candidate has right to be considered in accordance with law.

(vii) Shankardas Vs. Union of India reported in AIR 1991 SC 1641. The Supreme Court has held " The decision of the Government for not filling up vacancies has to be taken bonafide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to repeat the comparative merit of the

candidates, as reflected at the recruitment test and no discrimination can be permitted."

(viii) Jagtar Singh Vs. Director General, reported in 1993 (2) SLR 539. The Supreme Court has held that the petitioners' right to be appointed as Sr. Public Prosecutor was unjustifiably denied and on the basis of single incident of 1983 even then the prayer was refused due to age of 50 years and experience of 22 years practice as an advocate.

(ix) K. Jaya Mohan Vs. State of Kerala reported in 1997 (5) SCC 170. The Supreme Court has held "It is settled legal position that merely because a candidate is selected and kept in waiting list, he does not acquire any absolute right to appointment. It is open to the Government to make the appointment or not. Even if there is vacancy, it is not incumbent upon the Government to fill up the same. But the appointing authority must give reasonable explanation for non-appointment. Equally, the Public Service Commission/Recruitment Agency shall prepare a waiting list only to the extent of anticipated vacancies."

(x) Pilla Sitaram Patrudu Vs. Union of India reported in AIR 1997 SC 250. It has been held by the Supreme Court "Since he was selected by direct recruitment, he is entitled to be appointed according to Rules. His appointment was delayed for no fault of his and he came to be appointed in 1981 he is, therefore, entitled to the ranking given in the select list and appointment accordingly.

(xi) A.N. Pathak Vs. Secretary to the Government reported in 1987 (3) All India Service Law Journal 39. It has been held by the Supreme Court "The rules enabling the authorities to fill in vacancies for direct recruits as and when recruitment is made and thereby destroying the chances of promotion to those who are already in service cannot be viewed with disfavour. If the authorities want to adhere to the Rules strictly all that is necessary is to be prompt in making the direct recruitment. Delay in making appointment by direct recruitment should not visit the promotees with adverse consequences, denying them the benefit of their service."

(xii) In the case of Prem Singh and Others Vs. Haryana State Electricity Board reported in (1996) 4 SCC 319, it has been held by the Supreme Court "The selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies

but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can not deviate from the advertisement and make appointments on posts, falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf."

(xiii) Learned counsel for the petitioner also relied on the case of R.S. Mital Vs. Union of India, reported in 1995 Suppl. (2) SCC 230, wherein the Supreme Court has held "It is no doubt correct that a person on the select panel has no vested right to be appointed on the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then ordinarily, there is no jurisdiction to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law."

(xiv) In the case of Bihar State Unemployed Civil Engineers Association and Others Vs. The State of Bihar and Others, reported in AIR 1996 SC 2248, it has been held "It is true that Court cannot give direction to fill up vacancies from the waiting list after lapse of one year. But in this case, the High Court had given exception to the principle, an interim direction given earlier to keep the waiting list alive was in operation till the disposal of the writ petition. The High Court has also found that on the basis of the material on record it was not possible for the Court to record any finding as to number of vacancies existing as on December 31, 1987 so as to give direction to fill up those posts from the candidates available.

(xv). In the case of The State of Mysore Vs. M.H. Bellary, reported in AIR 1965 SC 868, it has been held "It was not disputed that if there was a breach of the statutory Rules framed under Articles 309 or 313 the government servant could have recourse to the Court for redressal.

(xvi) In the case of Miss Asha Kaur and Another Vs. State of Jammu and Kashmir and Others, reported in Service Law Reporter 1993 (2) 560, wherein it has been held by the Supreme Court "The Government has no absolute power to disapprove or cancel the select list sent by the Public Service Commission. It cannot pick and choose candidates out of the list. Of course, where in respect of any particular candidate any material is discovered disclosing his involvement in any criminal activity, the Government can always refuse to appoint such person but this would not be a case touching the select list prepared and recommended by the Commission, it is equally not open to the Government to approve a part of the list and disapprove the balance."

(xvii). In the case of Shankarsan Dash Vs. Union of India, reported in AIR 1991 SC 1612, it has been held by the Supreme Court "Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bonafide for the appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates as reflected at the recruitment test and no discrimination can be permitted."

7. Learned counsel for the respondents no. 2 and 3 has filed an affidavit-in-reply. Ad-interim order passed by this Court was modified to the effect that appointment, if any, that may be made during pendency of the petition will be purely on adhoc basis and subject to the result of this petition. It further pointed out that the petitioners have been impleaded as parties as respondents in Special Civil Application No. 3686/91. But for some reasons they have not chosen to mention with regard to pendency of Spl. C.A. No. 3687/91 in the present petition. The persons who were at Sr. No. 1 and 2 have been appointed on purely adhoc basis as Sr. Inspector of Factories. The whole examination and process by which the present select list/waiting list was prepared is under challenged and the persons who were in the select list and not in waiting list have already joined and are working there is no question now of operating the waiting list as contended by the petitioners. Requisition was sent for two posts and accordingly the advertisement was issued and both two persons were selected and vacancies of two posts have been filled up. Now, no questions arises for operating



the said waiting list. There is no requisition by the State Government and even if any excess posts are filled up by promotion there is no question of operating the waiting list. Once the post has been filled up in accordance with requisition then for the subsequent posts which have been fallen vacant the said waiting list cannot be operated. For that purpose, further process with regard of requisition and selection has to be followed. This Court in Civil Application No. 1754/93 filed in Special Civil Application No. 3412/92 passed the following order :

"The waiting list admittedly is operative till 30th August, 1993. Let the decision be taken by the concerned authority whether any appointment should be made or not from the waiting list before 30th August, 1993. S.O. to 30th August, 1993."

8. Since 1966-67 to 1980-81 all the posts were filled up by the promotees. Hence, the respondents could not compute as there was no advertisement whatsoever for direct recruits. The respondents joined the department in the year 1972. After 1980-81 all seven posts of Sr. Inspector of Factories have been filled up by direct recruits. The petitioners came in the department in the year 1982. As such they cannot claim seniority since 1966. While, the respondents are 10 years senior to the petitioners and they joined the department in the year 1972. Only the petitioner no. 3 who was in the waiting list joined in the year 1973, is also junior to the respondents and was promoted to the next higher posts in December, 1980. If the quota rule has not been followed continuously for number of years because it was impossible to do so the interference is irresistible that quota rule has broken down.

9. Learned counsel for the respondents no. 2 and 3 has also cited certain orders passed by this court. In Spl.C.A. No. 4168/85 this Court has held that the select list dated 12-8-83 prepared by the Commission has become inoperative after 12-8-1985 since the Government also does not intend to make further appointments from the said list, no formal order is necessary and that petition was dismissed by the order dated 11-11-1986. This Court in Civil Application No. 1665/89 in Special Civil Application No. 5921/87 passed the order wherein it was held that though the period of two years is over the select list should be permitted to be operated. The prayer cannot be granted. The Court proceedings may last for number of years. It is well known that in some cases

the Court proceedings have not come to an end, and are not coming to an end, for a decade or two. On this account, all other eligible persons cannot be denied the chance to compete for the posts in question. Hence, the permission as prayed for cannot be granted.

10. Learned counsel for the respondents no. 2 and 3 has also relied on the case of K. Jayamohan Vs. State of Kerala and Another, reported in 1997 (5) SCC 170.

11. I have carefully considered the submissions advanced on behalf of the parties and perused the relevant papers. A list prepared by Commission reflects two portions, first part shows the names of persons who are selected on the posts which were notified as vacant and this part of list is called as Select List; and other part shows names of persons according to their merit, this portion of the list is known as wait list. The main controversy revolving in this case is in respect of right of a candidate whose name finds place in wait list. Now the question arises as to whether any candidate whose name is enlisted in the waiting list can claim for appointment as a matter of right, what is scope of such wait list and how long it remains operative. In this connection I may point out that the Supreme Court has laid down a settled rule of law in the case of Gujarat State Dy. Executive Engineers' Association Vs. The State of Gujarat & Ors. in Civil Appeal No. 5193 of 1989 decided on 10-5-1994 reported in JT 1994 (1) SC 559, wherein the Supreme Court has held as under :

"Coming to the next issue, the first question

what is a waiting list ? can it be treated as a source of recruitment from which candidates may be drawn as and when necessary ? and lastly how long can it operate ? These are some important questions which do arise as a result of direction issued by the High Court. A waiting list prepared in service matters by the competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. How it should operate and what its nature may be governed by the rules. Usually it is linked with the selection or examination for which it is prepared. For instance, if an examination is held any for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of these ten seats only for which selection or competition was held. Reason for it is that whenever selection is held, except

where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to recruitment. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. A candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate join. But once the selected candidates join and no vacancy arise due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided then candidate from the waiting list has no right to claim appointment to any future vacancy which may arise unless the selection was held for it. She has no vested right except to the limited extent, indicated above, or when the appointing authority acts arbitrarily and makes appointment from the waiting list by picking and choosing for extraneous reasons.

A waiting list prepared in an examination

conducted by the Commission down and furnish a source of recruitment. It is operative only for the contingency that if any of the selected candidates does not join then the person from the waiting list may be pushed up and be appointed in the vacancy so caused or if there is some extreme exigency the Government may as a matter of policy decision pick up persons in order of merit from the waiting list."

12. In the latest decision of the Supreme court in the case of Surinder Singh & Ors. etc. Vs. State of Punjab & Anr. etc. reported in JT 1997 (7) SUPREME COURT 537 wherein the rule laid down by the Supreme Court in the case of the Gujarat State Dy. Engineers' Association Vs. The State of Gujarat & Ors reported in reported in JT 1994 (3) SC 559 has been reiterated and followed and it has been held "the authority cannot be allowed to fill up more posts than advertised and the State should consider the existing and anticipated

vacancies before advertising Candidates in wait list have no vested right to be appointed except when a candidate selected does not join and waiting list is still operative. In the case of Ashok Kumar & Ors. Vs. Chairman, Banking Service Recruitment Board & Ors, reported in 1996 (1) SCC 283, the Supreme Court has held "Recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Articles 14 read with Article 16 (1) of the Constitution. The procedure adopted, therefore, in appointing the persons kept in the waiting list by the respective Boards, though, the vacancies arisen subsequently without being notified for recruitment is unconstitutional.

13. It is a well settled principle of law that waiting list does not provide any source of recruitment and the persons who are in waiting list have no vested right for appointment. They can be appointed only subject to the conditions (i) if any person of the select list does not join due to any reason or any exigency, and (ii) waiting list is operative and/or (iii) the State Government has taken a policy decision that the persons who are in the waiting list may be appointed. In the present case, it appears from the assertions made in para 7 of the affidavit-in-reply filed by D.V. Solanki, Under Secretary, that as per the requirements the Department has already sent requisition for direct recruitment to the Gujarat Public Service Commission vide the department's letter No.FDE/1087/1532/M (1) dated 28-6-1990. The Gujarat Public Service Commission, however, returned the said requisition to the Department saying that the vacant posts should either be filled in from the waiting list or revised requisition be sent to the Gujarat Public Service Commission for fresh advertisement. It appears that the Government has not sent fresh requisition to the Gujarat Public Service Commission for direct recruitment as stated above. But it was only a communication between the Government and GPSC regarding certain vacancies which occurred later on. Hence, the Gujarat Public Service Commission sent the communication to the Department requesting either to fill up the vacancies from the waiting list or a revised requisition be sent so that fresh advertisement of other vacancies could be made and the process can be started for that purpose. It is also mentioned in para 10 of the affidavit-in-reply that the Government has not taken any policy decision that the candidates from the waiting list should be appointed as regular measure.

14. From the discussion above, it appears that the

petitioners being enlisted in the waiting list have no vested right to be appointed on the vacant post which has not been notified by the Gujarat Public Service Commission on the directions of the State Government nor the State Government has taken policy decision that the candidates who are in the waiting list should be appointed. As such, the petitioners being the candidates enlisted in the waiting list have not vested right to claim appointment.

15. Thus, this petition has no merit. Accordingly, the petition is dismissed. Rule is discharged with no order as to costs. Interim relief, if any, stands vacated.

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/JVSatwara/